

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM H. COCKING	:	CIVIL ACTION
	:	
v.	:	
	:	
WEEKS MARINE, INC.	:	NO. 97-5744

O R D E R - M E M O R A N D U M

AND NOW, this 5th day of May, 1998, the motion for summary judgment of defendant Weeks Marine, Inc. is denied. Fed. R. Civ. P. 56.¹ There appears to be a triable issue whether Barge 512 was a "vessel in navigation" under the Jones Act, 46 U.S.C.App. § 688 et seq. (1994 & Supp. 1997), at the time of the accident.

"[T]he . . . inquiry whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide. . . . Removing the issue from the jury's consideration is only appropriate where the facts and the law will reasonably support only one conclusion." Chandris, Inc. v. Latsis, 515 U.S. 347, 373, 115 S. Ct. 2172, 2192, 132 L. Ed.2d 314 (1995).

¹ "[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (quoting Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994) (further citation omitted)).

The Second Circuit, in Tonnesen v. Yonkers Contracting Company, Inc., 82 F.3d 30 (2d Cir. 1996), articulated a three-part inquiry for ascertaining whether, as a matter of law under the Jones Act, a floating structure is not a "vessel in navigation." Was the structure (1) being employed primarily as a work platform for some period of time before the accident; (2) moored or otherwise secured when the accident occurred; and (3) despite its being capable of movement, used principally as a work platform? See Tonnesen, 82 F.3d at 36. These factors should be applied restrictively, however, "to preserve a jury determination . . . where there is some evidence of a transportation function." See id. at 35. If, for example, the structure was "used recently for the transportation of passengers, cargo, or equipment across navigable waters, the fact that it was moored at the time of the accident would not automatically disqualify it from vessel status." Id. (citing Chandris, 515 U.S. at 373, 115 S. Ct. at 2192).²

Here, Barge 512 was generally moored a half-mile out in the Cape Fear River, but was occasionally brought by tugboat to a dock to load supplies and equipment. Plaintiff's deposition, at 36-37. The barge supported a crane and repair equipment. Id. at 39. On 14 occasions during the five months prior to plaintiff's injury, it was towed eight miles out into the ocean to facilitate repairs on the dredge "R.S. WEEKS." Id. at 43; defendant's motion, exhs. 3, 4. Although the barge was moored at the time of the

² Our Court of Appeals has not ruled on this issue.

accident, there is a genuine issue whether its transportation function was merely incidental to its primary purpose as a work platform. See Tonnesen, 82 F.3d at 37 (denying summary judgment where a moored car float was alleged to have been moved several times in the weeks prior to the accident and to have transported supplies to the worksite); Brunet v. Boh Brothers Construction Co., 715 F.2d 196, 198 (5th Cir. 1983) ("While we agree that the barge was used more often to support the crane than to transport it, we cannot agree that the transportation function was so 'incidental' as to warrant a conclusion that the barge was not a vessel as a matter of law.").³

Edmund V. Ludwig, J.

³ Defendant's brief relies on the First Circuit's "vessel in navigation" test announced in DiGiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1123 (1st Cir.), cert. denied, 506 U.S. 827, 113 S. Ct. 87, 121 L. Ed.2d 50 (1992), under which a barge or float is required to be in actual navigation or transit at the time of the accident. See also Hatch v. Durocher Dock and Dredge, Inc., 33 F.3d 545, 548 (6th Cir. 1992) (following DiGiovanni). This view conflicts with the Supreme Court's statement in Chandris, 515 U.S. at 373, that a vessel may still be in navigation while it is anchored or dry-docked. It is likely that the Court would adopt the more flexible test enunciated in Tonnesen.